STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND CEPHUS CUMMINS,

Plaintiff-Appellant/Cross-Appellee,

v

HOME DEPOT U.S.A., INC., and HURLEY/BINSON'S MEDICAL EQUIPMENT, INC.,

Defendants,

and

INVACARE, INC.,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
November 15, 2007

No. 272173
Genesee Circuit Court
LC No. 04-079796-NZ

Before: Servitto, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's judgment directing a verdict in favor of defendant Invacare, Inc., based on the court's determination at a jury trial that plaintiff's implied warranty claim involving the use of a walker manufactured by Invacare, and supplied to plaintiff at a hospital after undergoing foot surgery, was subject to a disclaimer defense. Invacare cross appeals from the same judgment, arguing alternative grounds for affirming the judgment. We affirm.

We first consider plaintiff's pro se claim that the trial court erred in granting "summary disposition" at trial in favor of Invacare with respect to the disclaimer defense. We consider plaintiff's argument to be a challenge to the trial court's rejection of his trial counsel's claim that Invacare waived the disclaimer defense by not pleading it as an affirmative defense pursuant to MCR 2.119(F)(3)(b).

We review a trial court's application and interpretation of the court rules de novo. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Directors*, 472 Mich 117, 123-124; 693 NW2d 374 (2005). But "[d]ecisions concerning the meaning and scope of pleadings fall within the sound discretion of the trial court. Consequently, we only reverse

when the court has abused that discretion." *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

We are not persuaded that the trial court either misapplied MCR 2.111(F)(3)(b) or abused its discretion in construing the meaning of Invacare's pleadings. In general, an affirmative defense presumes liability, but denies that the plaintiff is entitled to recovery for some reason not disclosed in the plaintiff's pleadings. *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 241; 635 NW2d 379 (2001). The primary function of the pleading is to give notice of the defense sufficient for the opposing party to take a responsive position. *Hanon v Barber*, 99 Mich App 851, 856; 298 NW2d 866 (1980). MCR 2.119(F)(3)(b) requires a party to state facts constituting "a defense that by reason of other affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, in whole or in part."

In general, a manufacturer's liability for an implied warranty has developed under the common law and statute. See *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512; 486 NW2d 612 (1992); *Parish v B F Goodrich Co*, 395 Mich 271; 235 NW2d 570 (1975). Plaintiff's claim here, if we presume liability, establishes Invacare's breach of an implied warranty that the walker supplied to him was unfit for its intended use. Given Invacare's pleaded affirmative defense that plaintiff did not "rely on any implied or express warranty of the defendant," it would be logical for plaintiff to expect that Invacare would produce some type of statement made known to plaintiff. Assuming that Article 2 of the Uniform Commercial Code (UCC), MCL 440.2101 *et seq.*, applies to plaintiff's cause of action, a written exclusion or modification of an implied warranty or merchantability or fitness must be conspicuous. MCL 440.2316(2). The purpose of the conspicuous writing requirement is so that a reasonable person against whom it is to operate ought to notice it. See MCL 440.1201(10); *Davis v LaFontaine Motors, Inc*, 271 Mich App 68, 77; 719 NW2d 890 (2006). Therefore, it cannot be said that the trial court reached an unprincipled decision in concluding that the allegation regarding plaintiff's lack of reliance was sufficient to put plaintiff on notice of Invacare's disclaimer defense. Accordingly, we affirm the trial court's decision that Invacare did not waive its disclaimer defense predicated on the UCC.

The more significant question is whether the UCC disclaimer provision in MCL 440.2316 applies to plaintiff's claim for injuries and other economic losses predicated on the alleged breach of an implied warranty. We note that the trial court gave plaintiff's counsel an opportunity to address the legality of the disclaimer, but that plaintiff's counsel's only response was that it was unnecessary to address this issue because of the perceived merit in the affirmative defense argument. "Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997). We further conclude that, even giving plaintiff significant latitude, plaintiff has insufficiently briefed this issue for appellate consideration. Therefore, we deem this issue abandoned and decline to consider it. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003); *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001). Accordingly, we will assume for purposes of our review, that plaintiff's exclusive remedy was governed by the repair or replacement provision in the "lifetime limited warranty" disclaimer.

We further hold that plaintiff has not established any basis for disturbing the trial court's decision to dismiss this case based on the "lifetime limited warranty" provision for the walker. As a threshold matter, we note that while Invacare moved for summary disposition at trial, the judgment itself treated the motion as one seeking a directed verdict. A court is not bound by a party's choice of labels for an action or motion because this would put form over substance. See *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Although the motion was made before the close of plaintiff's proofs at trial, because the motion was resolved on the basis of plaintiff's testimony and exhibit evidence introduced at trial, we find that it is more accurately characterized as a motion for a directed verdict. MCR 2.515.

Our review of a trial court's decision on a motion for a directed verdict, similar to a decision on a motion for summary disposition, is de novo. *Diamond v Witherspoon*, 265 Mich App 673, 681; 696 NW2d 770 (2005). "The appellate court reviews all the evidence presented up to the time of the directed verdict motion, considers that evidence in the light most favorable to the nonmoving party, and determines whether a question of fact existed." *Id.* at 681-682.

Here, plaintiff has not shown any question of fact created by the trial evidence that would have precluded a directed verdict based on the "lifetime limited warranty." We will not search the record for factual support for a claim. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Further, the failure to brief a necessary issue precludes appellate relief. *Id.* at 364*; Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987). Therefore, we uphold the trial court's decision that, in substance, directed a verdict in favor of Invacare based on the "lifetime limited warranty."

In light of our decision, it is unnecessary to address the two evidentiary issues raised by plaintiff on appeal. Whether the trial court erred by limiting the use of the replacement walker to a demonstrative use at trial, or by excluding evidence of Invacare's complaint documents were immaterial to the trial court's decision to direct a verdict in favor of Invacare. Therefore, any error was harmless. MCR 2.613(A); MRE 103(a); *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004).

Finally, in light of our decision to affirm the judgment, it is unnecessary to address the alternative grounds for affirmance raised by Invacare on cross appeal.

Affirmed.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Christopher M. Murray